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CARIBTOW CORPORATION

[redacted]

OCCUPATIONAL SAFETY AND HE
REVIEW COMMISSION

[redacted]

PETITION FOR A WRIT OF
TO THE UNITED STATES COURT
FOR THE FIRST CIRCUIT
VACATE THE JUDGMENT

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INDEX

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	2
Constitutional and Statutory Provisions Involved	3, 4
Statement of the Case	4
Reasons for Granting the Writ	7
1. The Decision Below Raises Significant and Recurring Problems in National and International Relations of the United States of America and the Sovereign Commonwealth of Puerto Rico and Reverts the Latter to Colonial Status	7
2. The Decision Below Conflicts With the Decisions of Other Courts of Appeals as to the Proper Interpretation of 48 U.S.C. Section 731(d) and 734	12
Conclusion	15
Appendix (Opinion and Judgment of Court of Appeals and of Respondent)	17

Citations

U. S. Constitution	3
Constitution of Puerto Rico	3

Case Citations

	Page
Americana of Puerto Rico v. *Kaplus*, 368 F.2d 179	13
Cresall v. *Duran*, 368 F.2d 179	13
Fornaris v. *Ridge Tool Co.*, 400 U.S. 41 .....8, 13, 14	
Fonseca v. *Prann*, 282 F.2d 153	14
Granville-Smith v. *Granville-Smith*, 349 U.S. 1	13
Green v. *Biddle*, 8 Wheaton 1	10
Hodgson v. *Unión de Empleados de los Supermercados Pueblo*, — F.Supp. — (D.P.R., Jan. 30, 1974)	9
Katzenbach v. *Morgan*, 384 U.S. 641	13
Pérez Aldarondo v. *Superior Court*, P.R. Bar Assoc. No. 17 (1974)	9

Statutes

Act of July 3, 1952, 66 Stat. 327	3
Act of August 1, 1955, 69 Stat. 427	3
Act of December 29, 1970, 84 Stat. 1590	3, 4

Miscellaneous

Calamari, The Law of Contracts, West Pub. 1970 ed. ..	11

Supreme Court of the United States

OCTOBER TERM 1973

No. .....

CARIBTOW CORPORATION

Petitioner

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT AND MOTION TO VACATE THE JUDGMENT BELOW

The Petitioner Caribtow Corporation respectfully prays that a writ of *Certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered in this proceeding on March 18, 1974 and for additional relief of vacating the judgment below.

OPINIONS BELOW

The opinion of the Court of Appeals, as yet unreported, appears at Appendix A, *infra*. The decision of Respondent appears at Appendix B, *infra*. The Court of Appeals affirmed the decision of Respondent.

JURISDICTION

This is a proceeding brought by Petitioner challenging the imposition of a fine on the grounds that the statute enacted by the Congress of the United States under which it has been penalized is invalid in its application and coverage of the sovereign Commonwealth of Puerto Rico. The March 18, 1974 judgment of the Court of Appeals has been stayed to May 8, 1974 pending the filing of this Petition. The jurisdiction of the Supreme Court of the United States to review the judgment of the Court of Appeals is conferred under Title 28, United States Code, Section 1254 (1). This Petition has been filed within 90 days from date of judgment. Decisions that sustain the jurisdiction of the Supreme Court to review include *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282 (1921); and *Nashville C. & St. L. Ry.* v. *Walters*, 294 U.S. 405 (1935).

QUESTION PRESENTED

THE CONGRESS OF THE UNITED STATES LACKS CONSTITUTIONAL POWER TO UNILATERALLY MAKE NEW STATUTES APPLICABLE TO PUERTO RICO SUBSEQUENT TO THE ADVENT OF THE CONTRACTUAL COMMONWEALTH STATUS ENTERED INTO BY THE PEOPLE OF PUERTO RICO AND THE CONGRESS. THE DECISION BELOW REVERTS PUERTO RICO TO THE STATUS OF A COLONY.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Art. IV, Section 3:

The *Congress shall have Power to dispose of* and make all needful Rules and Regulations respecting *the Territory or other Property belonging to the United States;* and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Constitution of Puerto Rico, Section 1 (48 U.S.C. 731d):

The Commonwealth of Puerto Rico is hereby constituted. Its political *power emanates from the people and shall be exercised in accordance with their will,* within the terms of the *compact* agreed upon between the people of Puerto Rico and the United States of America.

United States Code, Title 48, Section 734:

The statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Puerto Rico as in the United States, except the internal revenue laws other than those contained in the Philippine Trade Act of 1946: Provided, however, that after May 1, 1946, all taxes collected under the internal revenue laws of the United States on articles produced in Puerto Rico and transported to the United States, or consumed in the island shall be covered into the Treasury of Puerto Rico.

United States Code, Title 29, Section 651:

651 (b): The Congress declares it to be its purpose and

policy through the exercise of its powers *to regulate commerce among the several States* and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources.

652 (7): The term "State" includes a State of the United States, the District of Columbia, *Puerto Rico,* the Virgin Islands, American Samoa, Guam, and the Trust Territory of the Pacific Islands.

653 (a): *This chapter shall apply* with respect to *employment performed* in a work-place in a State, the District of Columbia, *the Commonwealth of Puerto Rico,* the Virgin Islands, American Samoa, Guam, the Trust Territory of the Pacific Islands, Wake Island, Outer Continental Shelf Lands defined in Outer Continental Shelf Lands Act, Johnston Island, and the Canal Zone.

666 (k): *Civil penalties* owed under this chapter shall be paid to the Secretary *for deposit into the Treasury of the United States and shall accrue to the United States* and may be recovered in a civil action in the name of the United States brought in the United States district court for the district where the violation is alleged to have occurred or where the employer has its principal office.

STATEMENT OF THE CASE

This case involves Public Law 91-596, enacted by the 91st Congress on December 19, 1970, known as the "Occupational Safety and Health Act of 1970", 18 years after the advent of the Commonwealth of Puerto Rico.

On March 15, 1973, Petitioner received a letter from the Secretary of Labor of the United States (hereinafter referred to as the "Secretary") entitled "Citation for Serious Violation" and notification of a proposed fine in the amount of $700.

On March 26, 1973, Petitioner wrote and contested the referred to citation as well as the proposed fine.

On April 6, 1973, the Secretary then sent Petitioner an alleged complaint which was subjected, on April 17, 1973, to a "Motion to Dismiss" for lack of jurisdiction on the grounds that:

> "... the Congress of the United States of America does not have the power to legislate over the Commonwealth of Puerto Rico, which although is specially associated with the United States of America, did not submit as a colony, to such unilateral legislation".

Faced with Petitioner's Motion to Dismiss, on April 24, 1973, the Secretary filed a pleading alleging that the referred to "Motion to Dismiss" involved the constitutionality of the Occupational Safety and Health Act of 1970, and stated that:

> "... neither the Commission nor its judges has the authority to rule upon the constitutionality of the Act".

Petitioner, thereupon, filed a "Motion" dated April 26, 1973, and advised respondent and the Secretary that it had not and would not post a so-called "Notice to Employees", OSAHRC Form 3 11-1-72, and accompanied copy of said notice marked as Exhibit "A".

Respondent issued a ruling and order on May 24, 1973 directing Petitioner to show cause within fifteen (15) days, why the Secretary's "Motion to Dismiss the Notice of Contest" should not be granted. It also flatly denied Petitioner's motion to dismiss for lack of jurisdiction.

Thus, on June 12, 1973, Petitioner was compelled to file an Involuntary Answer to Complaint, which answer caused, on June 20, 1973, the Secretary to again move to have Petitioner's "Notice of Contest" dismissed on the grounds that said Petitioner refused to comply with Rule 7 (g) of Respondent, that is, posting of the so-called "Notice to Employees", OSAHRC Form 3 11-1-72.

On August 16, 1973, Respondent granted the Secretary's "Motion to Dismiss" and reaffirmed the alleged "Serious Violation Citation" which had been issued on March 15, 1973 as well as the proposed $700 fine. On August 23, 1973, Petitioner requested review in the Court of Appeals of the dismissal order of Respondent which was made final with a new decision of Respondent dated December 13, 1972.

The Court of Appeals below gave its interpretation of the present political status of Puerto Rico and held, in short, that by virtue of 28 U.S.C. Section 9, this particular Act was one of those pieces of legislation which the Congress could make with no provision for prior consent of the people of Puerto Rico. It further held that Section 9 of the Puerto Rican Federal Relations Act provides that federal legislation requires no prior consent of Puerto Rico.

Petitioner contends that on July 25, 1952, the Commonwealth of Puerto Rico became a sovereign body politic and that the Congress of the United States of America, may not

legislate over such Commonwealth without the consent and approval not only of the Government of Puerto Rico, but also of the People of Puerto Rico who approved the contractual *compact* under which the said Commonwealth was established twenty-two (22) years ago, and that only federal laws or amendments thereto, which were in force at the time of signing the *compact*, may be applicable to such Commonwealth.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS IN NATIONAL AND INTERNATIONAL RELATIONS OF THE UNITED STATES OF AMERICA AND THE SOVEREIGN COMMONWEALTH OF PUERTO RICO AND REVERTS THE LATTER TO COLONIAL STATUS.

Section 1 of the Constitution of Puerto Rico reflects the principle of government by the *consent* of the governed. In direct contravention to such a great principle the Court of Appeals held that the consent of the People of Puerto Rico, to participate in the enactment of legislation dealing directly with their persons and property is not required and that the Congress does not have to obtain prior approval of federal laws before they are made applicable to Puerto Rico and its almost 3 million inhabitants. Caribtow is emphatic in its refusal to bow to the challenge made to the right of free determination of these American citizens and rejects the concept that Commonwealth status may be nothing more than a mask over the reality of a colonial relationship which affronts the dignity of the Puerto Rican people.

In reliance of the decision of this Honorable Court in

Fornaris v. *Ridge Tool Co.*, 400 U.S. 41 (1970), the Court of Appeals colored the holding below and stated that the federal statute in question followed a Spanish tradition in the sense that its intent could not be alleged to be other than:

> ... the safety of workers as being other than supportive of the cultural and legal heritage of Puerto Rico.

Such an alleged Spanish tradition was followed with a footnote explaining that the government of Puerto Rico was supportive of such unilateral labor legislation. There is no evidence in the record of this case on which to base such a statement. Moreover, the decision of the Court of Appeals caused the Governor of Puerto Rico, the Honorable Rafael Hernández Colón, on April 27, 1974, to repudiate, publicly, in the Congressional hearings being presently held on the culmination of the present political status of Puerto Rico, the existence of the statute under challenge in this case as being in contravention of the "compact" under which the Commonwealth of Puerto Rico was created.

The First Circuit stated in its March 18, 1974 judgment that it could find no authority or persuasive reasoning or policy to support Caribtow's position that a "compact" had been entered into by the Congress and the People of Puerto Rico and that such a contract could not be amended, altered or cancelled by one party without the consent of the other. That Honorable Court stated that there was no merit in Caribtow's distinguishing pre-Commonwealth federal legislation with laws enacted after the 1952 "compact". The rationale offered was that Section 9 of the Federal Relations Act was of "prospective" application in light of the legislative history of the said Federal Relations Act. Prior organic acts enacted when Puerto Rico was a colony were

cited in support of such reasoning. In so holding, the treatment as a colony of Puerto Rico, as applied in pre-Commonwealth days, was admittedly re-established and re-applied with reliance of historical *colonial organic acts* which existed before the advent of the 1952 freely chosen Commonwealth status.

Legally, the most that the First Circuit could say about its interpretation of the breach by the Congress of the 1952 "compact", was that in a recent interlocutory order in a case pending before the District Court for the District of Puerto Rico, the said trial Court had "found" that a post-Commonwealth federal statute was applicable to Puerto Rico on basis that it dealt with legislation in a federal area. *Hodgson* v. *Unión de Empleados de los Supermercados Pueblo*, — F.Supp. — (D.P.R., Jan. 30, 1974). In so doing the Court of Appeals elected not to follow the more recent decision of the Supreme Court of Puerto Rico, dated February 20, 1974 of *Pérez Aldarondo* v. *Superior Court*, P.R. Bar Assoc. No. 17 (1974) where an opposite result was reached and where the Puerto Rican Court held that the decisions of Federal Court of Appeals were not mandatory for application by the Courts of Puerto Rico. The highest Court of Puerto Rico gave in its opinion some samples of the correct interpretation of Section 9 of the Federal Relations Act consistent with the right to self determination of the People of Puerto Rico, and further gave citation of various post-Commonwealth federal acts to which the Legislature of Puerto Rico has consented to become applicable in the Commonwealth of Puerto Rico.

Even with the doubtful precedent of the District Court interlocutory order entered in *Hodgson* v. *Unión de Empleados de los Supermercados Pueblo, supra*, the First Cir-

cuit Court of Appeals could not and did not discuss how it could be possible for one party to unilaterally amend a bilateral contract without the consent of the other party. No one can deny that a "compact" is a contract. This Honorable Supreme Court of the United States held at an early date that a "compact" was a "contract". *Green* v. *Biddle*, 8 Wheaton 1 (1823). The mere fact that the word "compact" was used by the Congress in approving Public Law 600 in 1952, admitted an express recognition of the contractual capacity of the People of Puerto Rico. It is well known that if one of the parties, breaks a contract the other can go to Court to have his rights protected. Caribtow asked for such protection and the Court of Appeals denied it stating that Commonwealth status was subject to the unilateral continued legislative power of the Congress. That proposition has no support, legally or otherwise. The fact that the People of Puerto Rico acted, that there was a democratic vote on a political status and on a specific law of political relationship between the Island and the United States, must have binding conseqeuences from the point of view of national and international laws. There is a reality here, the Commonwealth of Puerto Rico is not property; it is composed of human beings, of people with a cultural tradition for self-determination as venerable as that of residents of the continental United States. The vote of those human beings in 1952 in choosing their own political status should be accorded significance. The question is not whether the Act is a good law but whether Congress has power to pass good or bad laws over the Commonwealth of Puerto Rico without its consent.

Moreover, under basic tenets of Contract law an illusory promise has been defined as:

> an expression cloaked in promissory terms, but which, upon closer examination, reveals that the promissor has committed himself not at all. *Calamari*, The Law of Contracts, West Pub. 1970 Ed. p. 133.

The refusal of the Court of Appeals to recognize to the People of Puerto Rico the contractual right that they had acquired in 1952 and the statement that the Commonwealth of Puerto Rico cannot ignore or nullify federal legislation enacted without its consent and participation is open to serious question and is of national and international importance because it stands for the proposition that the contractual "prior" consent of Puerto Rico was necessary for agreement in the 1952 "compact" yet for new legislation, such "prior" consent is deemed unnecessary by the First Circuit Court of Appeals. Caribtow respectfully asks: Why was the consent of the People of Puerto Rico required for the 1952 political contractual legislation and is not required for 1974 legislation to be applicable to Puerto Rico? The interpretation of the 1952 political contract, as handed down by the Court of Appeals, rested upon the proposition that after the advent of Commonwealth the Congress has applied legislative acts to Puerto Rico without any requirement of prior approval by the Legislative Assembly of Puerto Rico. The Honorable Rafael Hernández Colón in his public denunciation of the passage of such unilateral legislation and its direct contravention of the 1952 Commonwealth-compact, publicly and for the Congressional Committee on the Status of Puerto Rico stated on April 27, 1974 that under the referred to 1952 "compact" there was no duty on the part of the Congress to pass such legislation. The application to Caribtow, of the Act, in breach of the legal and moral commitment agreed upon between the Congress and the People of Puerto Rico in 1952 makes this case one of first impres-

sion and one in which the democratic values of self-determination, self-government and government by consent of the governed rest on the decision of this Honorable Court over the political creation called "Commonwealth of Puerto Rico".

2. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL AS TO THE PROPER INTERPRETATION OF 48 U.S.C. SECTION 731 (d) AND 734.

The First Circuit's opinion in this case reflects important statutory and policy considerations growing out of *bona-fide* efforts of the People of Puerto Rico to exercise the right to self-determination. These American citizens in the exercise of their right of free determination have expressed their wish to be permanently associated with the United States of America as a self-governing Commonwealth. And since this Honorable Court has not had occasion to address itself to these matters since the 1952 creation of the Commonwealth of Puerto Rico, Caribtow feels that there are compelling reasons why some definitive guidelines in the application of sections 731 (d) and 734 of U.S.C. should now be marked by this Honorable Court. Different interpretations of sections 731 (d) and 734 are of common if not increasing occurrences, and both litigants and lower courts urgently need the assistance of this Court in understanding the policies and intent underlying the language of the referred to statutory enactments. Among the unanswered questions thus posed are:

(1) What is the "Commonwealth of Puerto Rico" or "Estado Libre Asociado de Puerto Rico" according to section 731 (d), Title 48 U.S.C.? It has often been a problem

in judicially wrestling with the *unique* character of the concept of Commonwealth. Such unique character was awarded recognition by this Honorable Court in *Katzenbach* v. *Morgan*, 384 U.S. 641, 658, and was further discussed in *Granville-Smith* v. *Granville-Smith*, 349 U.S. 1, 6. In the latter case this Honorable Court distinguished the present political status of Puerto Rico with its prior political condition of unincorporated territory and referred to such status prior to 1952 as "pre-Commonwealth Pureto Rico". In 1970, again referring to the *unique* status of Puerto Rico, this Honorable Court dismissed the appeals filed in *Fornaris* v. *Ridge Tool Co.*, *supra*, inasmuch as said appeals had been based on the incorrect interpretation of a Puerto Rican statute which the appellants erroneously thought to be a "state" statute, whereupon the documents were considered by this Honorable Court as petition for *certiorari*. The Honorable Court further stated:

> The relations of the federal courts to Puerto Rico have often raised delicate problems.

Thus, the Third Circuit Court of Appeals declared the Commonwealth of Puerto Rico to be a territory, "property" of the United States, in *Americana of Puerto Rico* v. *Kaplus*, 368 F.2d 431 (1966) subject to the power of Congress to allegedly be disposed of and governed with all ". . . needful rules and regulations respecting said territory or other property belonging to the United States".

Another Court of Appeals has given a different interpretation of what occurred in 1952 with the enactment of Section 731 (d). The Second Circuit held in *Cresall* v. *Duran*, 368 F.2d 179 (1967) that the Commonwealth of Puerto Rico should be considered as a "state".

Yet another conflicting judicial interpretation exists and was given by the First Circuit prior to the decision under challenge herein. In *Fonseca* v. *Prann,* 282 F.2d 153 (1960) that High Court had declared:

> But, whatever the actual status of the Commonwealth of Puerto Rico may be in all its detail, *its present status is certainly not that of a State* of the United States. *Nor is it even that of a territory incorporated* into the Union preparatory to Statehood.

Caribtow submits that any such comparisons are not only erroneous but hinder understanding and limit creativity. Commonwealth is a political relationship between Puerto Rico and the United States, unique in its constitutional features and very different from statehood. The federation of states responds to the needs of government of a country which is close-knit, and culturally homogeneous, however vast. Commonwealth, on the other hand, responds to the needs of government of two peoples with profound cultural diversity, but with common basic values and fundamental objectives. In *Fornaris, supra,* this cultural diversity was acknowledged.

The heart of the problem confronting and causing the conflict between the Courts of Appeals is how to interpret the Federal Relations Act (Section 734, Title 48, U.S.C.) to make it compatible with democratic values. Generic consent, the equivalent of signing a blank check, is simply incompatible with the principle of government by consent. No community of American citizens ought to be governed by laws in whose making they have no direct participation. The First Circuit decided below that such participation was unnecessary and accorded to the Congress sole power over

Puerto Rico. Thus, in the free association created and adopted by the two compacting sovereigns in 1952 one is dominant and the other is subordinated. No partnership can endure with such a fundamental flaw. Obviously, the time has come for this Honorable Court to treat the motive problem definitely and to give a modern version of the statutory intent that concerned the Congress and the People of Puerto Rico in 1952, with an express assurance that any exercise of power by the compacting parties be commensurate with the permanent political relationship undertaken by and for the consequent solidification of the presently existing permanent association between Puerto Rico and the United States. The judgment below, being the confirmation of an exaction in Puerto Rico of a penalty to be assessed and to accrue for the benefit of the Secretary of the Treasury of the United States, should be revoked.

CONCLUSION

For the above reasons and principles of law and justice, a writ of *certiorari* should issue to review the judgment and opinion of the First Circuit, and in due course, for the revocation of said judgment.

Respectfully submitted,

EDELMIRO SALAS GARCIA
Suite 810, Pan Am Bldg.
255 Ponce de León Ave.
Hato Rey, Puerto Rico 00917
Counsel for Petitioner

May, 1974.

I HEREBY CERTIFY that on this 4th day of May, 1974, three copies of the above Petition for Writ of *Certiorari* were mailed, postage prepaid, to Morton J. Marks, Esq., P.O. Box 9092, Santurce, Puerto Rico 00908; Morton Hollander, Esq., Irving Jaffe, Acting Assistant Attorney General; Stephen F. Eilperin and Jean A. Staudts, Attorneys, Department of Justice, Washington, D.C. 20530, Counsel for the Respondent. I further certify that all parties required to be served have been served.

EDELMIRO SALAS GARCIA
Counsel for Petitioner

APPENDIX "A"

United States Court of Appeals
For the First Circuit

No. 73-1285

CARIBTOW CORPORATION,
PETITIONER,
v.
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,
RESPONDENT.

ON PETITION FOR REVIEW OF AN ORDER OF THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Before COFFIN, *Chief Judge*,
McENTEE and CAMPBELL, *Circuit Judges*.

Edelmiro Salas Garcia for petitioner.
Morton Hollander, Attorney, Department of Justice, with whom *Irving Jaffe*, Acting Assistant Attorney General, *Stephen F. Eilperin*, and *Jean A. Staudt*, Attorneys, Department of Justice, were on brief, for respondents.

March 18, 1974

COFFIN, *Chief Judge*. An employee of Caribtow, a Puerto Rican corporation, was killed while engaged in trying to move a crawler crane from a barge to a dock in Santurce, Puerto Rico. After investigation, the Secretary of Labor, acting pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (the Act), issued a citation and notice of a proposed fine of $700 to the corporation for a serious violation of its duty to furnish its employees with a safe place to work, in failing to provide a ramp or other safe method for moving the crane from

barge to dock. 29 U.S.C. § 654(a)(1).[1] Caribtow, denying Congressional power to legislate concerning occupational safety in Puerto Rico, refused to post a statutory notice, 29 U.S.C. § 658(b), informing its employees of the citation, and of their right to participate as parties. The Administrative Law Judge, holding that Caribtow had by such breach forfeited its status as a party, dismissed its Notice of Contest and affirmed the citation and proposed penalty. The Occupational Safety and Health Review Commission affirmed and this petition for review followed.

The sole defense of Caribtow is that the Act cannot apply to Puerto Rico. The argument is not that the Act in terms does not apply, for the legislation could not be more specific: in its purpose — "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources", 29 U.S.C. § 651(b); in its geographical coverage—"This Act shall apply to employment . . . in . . . the Commonwealth of Puerto Rico"; and in the functional coverage of "commerce" as being commerce "among the several states", 29 U.S.C. § 652(3), Puerto Rico being specifically included for purposes of the statute as a "state", 29 U.S.C. § 652(7). Nor is there any suggestion that the Secretary of Labor or the Commission failed to follow properly the procedures and standards of the Act. The argument is simply that, subsequent to the advent of Commonwealth status, Congress lacks power unilaterally to make new statutes applicable to Puerto Rico.

The present political status of Puerto Rico stems from Public Law 600, enacted by the Congress of the United

[1] In its request for admission of facts, which was not contested by Caribtow, the Secretary of Labor alleged that Caribtow buys machinery and supplies from outside of Puerto Rico and sells construction materials and supplies to buyers located outside of the Commonwealth and that Caribtow is thus an "employer" within the meaning of the Act.

States in 1950 "in the nature of a compact", and approved by the people of Puerto Rico in referendum in 1951. Pursuant to this law the people of Puerto Rico adopted a Constitution in 1952 and the Congress of the United States approved that Constitution and repealed part of the old Organic Act (the Jones Act of 1917). The remainder of the Organic Act was renamed the Puerto Rican Federal Relations Act, 48 U.S.C. §§ 731 *et seq.* Section 9 of the Puerto Rican Federal Relations Act, 48 U.S.C. § 734, provides in relevant part that: "The statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter provided, shall have the same force and effect in Puerto Rico as in the United States. . . ." Caribtow does not allege that the Occupational Safety and Health Act is "locally inapplicable" in the sense meant in § 734. Indeed, it would be difficult to conceive of the fostering of the safety of workers as being other than supportive of the cultural and legal heritage of Puerto Rico.[2]

Section 9 of the Puerto Rican Federal Relations Act provides unquestionably that federal legislation requires no prior consent of Puerto Rico. Nothing in the language or in the legislative history can realistically support any other conclusion.[3] Furthermore, the provision was, in

[2] It should be added that the Commonwealth itself, through its Department of Labor, pursuant to 29 U.S.C. § 667(b), has submitted a notice of intent to submit a plan under which it would retain authority over working conditions subject to federal standards and has received several federal grants to help in developing such a plan, now in the review stage.

[3] Referring to the bill which became Public Law 600, the Secretary of the Interior, in a letter to the Chairman of the Senate Committee on Interior and Insular Affairs, characterized the basic effects of Public Law 600 in this way:

> "Those sections of the Organic Act of Puerto Rico pertaining to the political, social, and economic relationship of the United States and Puerto Rico concerning such matters as the applicability of United States laws . . . would remain in force and effect and . . . would be referred to as the Puerto Rican Federal Relations Act. The sections of the organic act which section 5

identical terms, part of the Organic Acts; and under those Acts no such prior consent was ever required.[4] The fact that the Commonwealth now possesses its own Constitution, and is governed with the consent of its inhabitants, does not establish that it is now so independent of the federal government that it may ignore or nullify national legislation and exert powers in this regard that are denied to the states, each of which also possesses a constitution and a republican form of government. What is determinative here is that application of the Occupational Safety and Health Act to Puerto Rico is fully consistent with the "compact".

As this court said in *Moreno Rios* v. *United States*, 256 F.2d 68, 71 (1st Cir. 1958):

> "Under the terms of the 'compact' to which the people of Puerto Rico have manifested assent, there remains in the Puerto Rico Federal Relations Act the important provision: 'The statutory laws of the United States not locally inapplicable . . . shall have the same force and effect in Puerto Rico as in the United States' 48 U.S.C. 734. Since the terms of the Narcotic Drug Import and Export Act would affect Puerto Rico in the same manner as they do the States of the Union, and since the problem dealt with is a general one, certainly not 'locally inapplicable' to Puerto Rico, it is clear that Congress has the power to apply the Act to Puerto Rico . . . ."[5]

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of the bill would repeal are the provisions concerned primarily with the organization of the local executive, legislative, and judicial branches of the government of Puerto Rico and other matters of purely local concern." U.S. Code Congressional and Administrative News 2685 (1950).

[4] *See Puerto Rico* v. *The Shell Co.*, 302 U.S. 253 (1937).

[5] *Accord, United States* v. *DeJesus*, 289 F.2d 37 (2d Cir. 1961); *Rodriguez Salgado* v. *United States*, 277 F.2d 653 (1st Cir. 1960); *Sanchez* v. *United States*, 256 F.2d 73 (1st Cir. 1958); *United States* v. *Carrion*, 140 F. Supp. 226 (D.P.R. 1956); *Mitchell* v. *Rubio*, 139 F. Supp. 379 (D.P.R. 1956); *United States* v. *Mejias*,

Caribtow attempts to distinguish this and other cases by pointing out that they all dealt with laws enacted prior to 1952 and thus only established that laws in effect in Puerto Rico before the compact remained so afterward.[6] But, passing the practical difficulty of distinguishing an "amendment" from a "new law", there are a number of reasons why the distinction proposed is of no substance. First, as we have noted, the legislative history of Section 9, and its prior existence in the Organic Acts of 1900 and 1917, militate against such an interpretation; and the language of its exceptions clause, "except as hereinbefore or hereinafter provided", also indicates that Section 9 is fully prospective. Secondly, no reason has been advanced why finding applicability to Puerto Rico of post-1952 legislation would do violence to the underlying reasoning of the cases dealing with pre-1952 legislation, nor can we think of any. Finally, to limit the cases in the way suggested by Caribtow, in the light of the clear language of Section 9, on which they were grounded, cannot be contemplated where no authority or persuasive reasoning or policy can be found to support such a result.[7]

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131 F. Supp. 957 (D.P.R. 1955); *Cosentino* v. *I.L.A.*, 126 F. Supp. 420 (D.P.R. 1954); *Arbona* v. *Kenton*, 126 F. Supp. 366 (S.D. N.Y. 1954); *Carrion* v. *Gonzalez*, 125 F. Supp. 819 (D.P.R. 1954); *see also Davis* v. *Trigo Bros. Packing Corp.*, 266 F.2d 174 (1st Cir. 1959); *Detres* v. *Lions Building Corp.*, 234 F.2d 596 (7th Cir. 1956); *In re Lummus & Commonwealth Oil Refining Co.*, 195 F. Supp. 47 (S.D. N.Y. 1961); *Mora* v. *Mejias*, 115 F. Supp. 610 (D.P.R. 1953); *cf. Waterman S.S. Corp.* v. *Rodriguez*, 290 F.2d 175 (1st Cir. 1961).

[6] In a very recent case the District Court for the District of Puerto Rico has found the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 *et seq.*, applicable to Puerto Rico. *Hodgson* v. *Union de Empleados de los Supermercados Pueblo*, ___ F. Supp. ___ (D.P.R. Jan. 30, 1974).

[7] Shortly after the Puerto Rican Federal Relations Act came into being, Chief Judge Magruder made the following relevant observation:

> "Thus it is apparently recognized in the compact that Congress has reserved the power, without future amendment of the Puerto Rican Federal Relations Act, to enact general legislation

Caribtow seeks to draw from a few congressional enactments that have specifically exempted Puerto Rico from coverage, or have made coverage optional with the Puerto Rican legislature, the general principle that Congress lacks power to do otherwise. This argument conveniently overlooks the fact that many more acts of Congress have been passed since 1952 either without such an exemption or with specific provisions making them applicable to the Commonwealth.[8] The fact that certain laws exclude Puerto Rico from the scope of their operation indicates no more than that Congress thought them "locally inapplicable" or otherwise inappropriate for the Commonwealth. And provision that a federal program operate in a jurisdiction only with the consent of that jurisdiction is not unique

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applicable to Puerto Rico as well as to the rest of the United States. There seems to be no implied moral commitment that the Congress will extend to Puerto Rico the provisions of such general legislation only after consultation and manifestation of consent by the people of Puerto Rico. . . . In enacting such legislation it would no more be necessary to obtain the consent of Puerto Rico than it would be to obtain the consent of the State of New York." Magruder, the Commonwealth Status of Puerto Rico, 15 U. Pitt. L. Rev. 1, 17 (1953).

[8] Section 4774 of the Narcotic Control Act of 1956 provided that its application to Puerto Rico was conditioned upon consent by the Legislative Assembly of the Commonwealth of Puerto Rico. *See also* Report of the United States - Puerto Rico Commission on the Status of Puerto Rico (1966) at 41, n. 31. And 48 U.S.C. § 751 excludes from operation in Puerto Rico the Interstate Commerce Act and the Safety Appliance Act. On the other hand, many more acts of Congress have been applied to Puerto Rico without any requirement of approval by the Legislative Assembly. *See* the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 802; the Rehabilitation Act of 1973, 29 U.S.C. § 780(b); Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 402(b); Public Works and Economic Development Act of 1965, 42 U.S.C. § 3216; Public Broadcasting Act of 1967, 47 U.S.C. § 397; Consumer Product Safety Act (1972), 15 U.S.C. § 2052(10); Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 721(a); Federal Insecticide, Fungicide and Rodenticide Act of 1972, 7 U.S.C. § 136; Economic Opportunity Act of 1964, 42 U.S.C. § 2949. *See also* Report of United States - Puerto Rico Commission, *supra* at 42.

in Puerto Rico.[9] The Occupational Safety and Health Act is one of those pieces of legislation which the Congress can make and has made applicable to the Commonwealth explicitly, and with no provision for prior local consent. That it has done and may again do otherwise with other legislation is beside the point.[10]

One final point deserves some discussion. 48 U.S.C. § 751, part of the Puerto Rican Federal Relations Act, provides that the Interstate Commerce Act and the Safety Appliance Act shall not apply to Puerto Rico. Caribtow argues that this provision means that all enactments dealing with interstate commerce cannot apply to the Commonwealth, and that, since the Occupational Safety and Health Act is phrased primarily in terms of interstate commerce, the ban contained in § 751 extends to it. But § 751 does not in terms or by any reasonable implication mean any more than what it clearly says: that two particular laws shall not operate in Puerto Rico.[11]

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[9] See for example the optional nature of state participation in the categorical assistance programs under the Social Security Act.

[10] The question whether, under the "compact", the Congress has power to enact legislation dealing with purely local Puerto Rican matters where it could not do so as to a state is not in issue here, since the application of the Occupational Safety and Health Act in this case was consistent with application of the Act to a state. *Compare Hodgson* v. *Union de Empleados de los Supermercados Pueblo*, ___ F. Supp. ___ (D.P.R. Jan. 30, 1974); *Liquilux Gas Services of Ponce, Inc.* v. *Tropical Gas Co.*, 303 F. Supp. 414 (D.P.R. 1969). *See*, Magruder, The Commonwealth Status of Puerto Rico, *supra*, 17-18.

[11] Although this court said in *Buscaglia* v. *Ballester*, 162 F.2d 805 (1st Cir.), *cert. denied*, 332 U.S. 816 (1947) that the Interstate Commerce Clause does not apply to Puerto Rico, we have no occasion here to reconsider that opinion in the light of intervening events. Under either that clause, or the Territorial Clause, Art. IV, § 3, cl. 2, *see Puerto Rico* v. *The Shell Co.*, 302 U.S. 253, (1937), it is clear that Congress has the power to apply the Occupational Safety and Health Act to Puerto Rico.

It has also been suggested that the "compact" itself is a source of power for the application to Puerto Rico of federal legislation which is consistent with the compact. *See Hodgson* v. *Union de Empleados de los Supermercados Pueblo, supra.*

We conclude, therefore, that the Occupational Safety and Health Act of 1970 applies to Puerto Rico, and that the Secretary of Labor and the Occupational Safety and Health Review Commission acted well within their authority.

The order of the Commission is *affirmed.*

Adm. Office, U. S. Courts — Blanchard Press, Inc., Boston, Mass.

APPENDIX "B"

United States of America

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

OSAHRC Docket No. 2547

SECRETARY OF LABOR,
COMPLAINANT,

v.

CARIBTOW CORPORATION,
RESPONDENT.

ORDER

Before MORAN, *Chairman;* VAN NAMEE and CLEARY, *Commissioners.*

MORAN, *Chairman:* A decision of Review Commission Judge Herbert E. Bates dated August 16, 1973, is before this Commission for review pursuant to section 12(j) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 *et seq.,* 84 Stat. 1590). That decision granting the complainant's motion to dismiss the respondent's notice of contest is hereby affirmed.

FOR THE COMMISSION

/s/ WILLIAM S. McLAUGHLIN
Executive Secretary

DATED: December 13, 1973

CONCURRING OPINION

CLEARY, *Commissioner*, CONCURRING:

I concur with the majority in the disposition of this case. Respondent's flagrant disregard for the rights of its employees clearly requires the Commission to grant the motion to dismiss. Denial of the Secretary's motion to dismiss respondent's notice of contest, in the face of respondent's defiant refusal to give notice to affected employees of their right to participate in the hearing, would negate the substantive and procedural rights of employees as expressly stated in the Act and the Commission's Rules of Procedure.

The Occupational Safety and Health Act of 1970 was enacted "... to assure so far as possible every working man and woman in the Nation safe and healthful working conditions."

In drafting the Act, Congress was careful to assure that employees could actively participate at every phase of the Act's operation.[1] One of the most important rights that Congress has given to employees is the right to participate as a party. Section 10(c) provides affected employees with the same rights as their employer to contest the reasonableness of abatement periods. Where employees do not choose to file an independent notice of contest, they may participate as parties in a hearing where the notice of contest was filed by the employer.

Section 10(c) states: "The rules of procedure prescribed

[1] See e.g., section 8(e) (right to accompany the inspector in the course of his inspection); section 8(f) (right to petition Secretary for an inspection); section 11(c) (prohibits discrimination against employees who have filed a complaint); section 13(d) (right to seek mandamus of Secretary where there is imminent danger).

by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection." The Commission has implemented this statutory mandate through rule 20(a), which gives employees an absolute right to party status before the hearing and a qualified right to party status thereafter. Rule 20(a) provides:

> Affected employees may elect to participate as parties at any time before the commencement of the hearing before the Judge, unless, for good cause shown, the Commission or the Judge allows such election at a later time.

Where an employer files a notice of contest, employees may become a party to the proceedings without filing a separate notice of contest under section 10(c) and rule 35. Where, however, an employer moves to withdraw its notice of contest before the hearing, affected employees are threatened with having the case terminated without their position ever having been considered unless they are apprised of the pending withdrawal.

As Judge Bates correctly concludes here, affected employees are likewise denied their right to participate where the employer fails or refuses to notify the employees of their right to participate initially.

The Commission's notice requirement is set forth in rule 7. This rule requires that where employees have an authorized representative, the representative must be served personally or by mail with all motions in the case. Where the employees have no authorized representative, rule 7(g) requires that all motions, notices of contest and other rele-

vant papers in the matter must be posted in a conspicuous place. A notice stating that employees can participate in the hearing as parties must also be posted.

In the performance of our function under the Act, we must resolutely protect the rights of employees and employers alike.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1665

CARIBTOW CORPORATION, PETITIONER

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION[1]

Petitioner contends that the Occupational Safety and Health Act cannot constitutionally apply to Puerto Rico.

1. On March 15, 1973, the Secretary of Labor cited petitioner, a Puerto Rican corporation, for a serious violation of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*, for moving a crawler crane from the deck of a barge onto a dock in an unsafe manner. During the transfer, the crane fell into the water, killing the crane operator. Following an investigation, the Secretary of Labor issued petitioner a notification of a proposed penalty of $700 for a serious violation of its duty

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[1]The Secretary of Labor is the real adverse party in interest in this case.

to provide its employees with a safe place to work. 29 U.S.C. 654(a)(1).

On March 26, 1973, petitioner filed a notice of intent to contest both the citation and the proposed penalty; and the Secretary's complaint before the Commission issued April 6, 1973. 29 U.S.C. 659(a); 29 C.F.R. 2200.33(a). On April 17, 1973, petitioner moved to dismiss the Secretary's complaint on the ground that Congress lacks the power to legislate over Puerto Rico. In a supplemental motion to dismiss, filed April 26, 1973, petitioner stated it refused to post a statutory notice informing its employees of the citation and of their right to participate in the litigation as parties. 29 U.S.C. 658(b); 29 C.F.R. 2200.7(g).

On August 16, 1973, the administrative law judge granted a motion to dismiss filed by the Secretary, holding that petitioner's continued refusal to post the required notice to employees constituted a breach of a condition precedent to its status as a party. The citation and proposed penalty were affirmed. The action of the administrative law judge was affirmed by the Occupational Safety and Health Review Commission.

Petitioner sought review in the United States Court of Appeals for the First Circuit, asserting that the Occupational Safety and Health Act of 1970 cannot apply to Puerto Rico. In a thorough and well reasoned opinion by Chief Judge Coffin, the court of appeals held that the Act applies to Puerto Rico, and, accordingly, affirmed the order of the Commission.

2. Petitioner's sole contention is that Congress lacks power to enact legislation applicable to Puerto Rico.

In 1950, Congress enacted Public Law 600[2] "in the nature of a compact," and this "compact" was approved

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[2]64 Stat. 319, 48 U.S.C. 731(b-e).

by the people of Puerto Rico in a referendum in 1951. Pursuant to this law, Puerto Rico adopted a constitution in 1952, which was approved by Congress. Congress also repealed part of the old Organic Act (the Jones Act of 1917).[3] The remainder of the Organic Act was renamed the Puerto Rican Federal Relations Act, 48 U.S.C. 731 *et seq.* Section 9 of this Act, 48 U.S.C. 734, provides:

> The statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Puerto Rico as in the United States * * *.

Petitioner does not contend that the Occupational Safety and Health Act of 1970 is "locally inapplicable," nor does petitioner assert that the Act is inapplicable to Puerto Rico by its terms.[4] Petitioner simply asserts that the Puerto Rican Federal Relations Act prohibited Congress from enacting any legislation, after the effective date of the Act, affecting Puerto Rico without Puerto Rican consent.

It is beyond dispute that Congress has the power to enact legislation affecting Puerto Rico.[5] Petitioner contends, however, that all of the cases supporting this proposition involved statutes enacted prior to 1952, and thus, only established that laws in effect in Puerto Rico before

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[3]39 Stat. 951, 48 U.S.C. 731 *et seq.*

[4]The Occupational Safety and Health Act of 1970 was expressly made applicable to Puerto Rico. See 29 U.S.C. 653(a).

[5]See *United States* v. *DeJesus*, 289 F. 2d 37 (C.A. 2); *Rodriguez Salgado* v. *United States*, 277 F. 2d 653 (C.A. 1); *Dario Sanchez* v. *United States*, 256 F. 2d 73 (C.A. 1); *Moreno Rios* v. *United States*, 256 F. 2d 68 (C.A. 1); *United States* v. *Mirabal Carrion*, 140 F. Supp. 226 (D.P.R.); *Mitchell* v. *Rubio*, 139 F. Supp. 379 (D.P.R.); *United States* v. *Mejias*, 131 F. Supp. 957 (D.P.R.); *Cosentino* v. *International Longshoremen's Association*, 126 F. Supp. 420 (D.P.R.); *Arbona* v. *Kenton*, 126 F. Supp. 366 (S.D.N.Y.); *Carrion* v. *Gonzalez*, 125 F. Supp. 819 (D.P.R.).

the compact remained so afterward.[6] Petitioner concludes that any subsequent legislation is invalid without Puerto Rican consent. There is no merit to this contention. Not only did Congress not include a requirement for such ratification by Puerto Rico in the Federal Relations Act, but it deliberately used the same language as that of the Organic Acts of 1900[7] and 1917,[8] neither of which had required Puerto Rico's consent to Congressional enactments. Moreover, the language of the exceptions clause to Section 9 of the Federal Relations Act—"except as hereinbefore or hereinafter otherwise provided"— indicates that Section 9 is fully prospective. This interpretation of Section 9 is also supported by the legislative history of the Federal Relations Act[9] and by subsequent federal legislation.[10]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1974.

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[6]But see *Hodgson* v. *Union de Empleados de los Supermercados Pueblos*, 371 F. Supp. 56 (D.P.R.).

[7]31 Stat. 77.

[8]39 Stat. 951, 48 U.S.C. 731 *et seq.*

[9]*See* H. Rept. No. 2275, 81st Cong., 2d Sess., U.S. Code Cong. and Adm. News 2688 (1950). *See also* Magruder, *The Commonwealth Status of Puerto Rico*, 15 U. Pitt. L. Rev. 1, 17 (1953).

[10]For example, the following post-1952 federal statutes were expressly made applicable to Puerto Rico: Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. 802(24); Rehabilitation Act of 1973, 87 Stat. 362; Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. 402(b); Public Works and Economic Development Act of 1965, 42 U.S.C. 3216; Public Broadcasting Act of 1967, 47 U.S.C. 397(1); Consumer Product Safety Act, 15 U.S.C. (Supp. II) 2052(a)(10); Federal Metal and Nonmetallic Mine Safety Act, 30 U.S.C. 721(a); Federal Insecticide, Fungicide, and Rodenticide Act of 1972, 7 U.S.C. (Supp. II) 136(aa); Economic Opportunity Act of 1964, 42 U.S.C. 2949(1).